

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL MISC.APPLICATION No. 4297 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

OMKARNATH S PARASHAR - Applicant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

Appearance :

M/S.VYAS ASSOCIATES for Applicant(s) : 1,

PUBLIC PROSECUTOR for Respondent(s) : 1,

MR SN SINHA for Respondent(s) : 2,

CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/10/2005

ORAL JUDGMENT

1.Rule. Mr. Mukesh Patel, learned APP and Mr. S.N. Sinha, learned advocate waives service of rule on behalf of Respondent Nos. 1 & 2 respectively. Since the complaint is of 1991, the matter is heard finally.

2.The petitioner has filed this petition under Section 482 of the Criminal Procedure Code praying for quashing and setting aside the orders dated 31.3.2003 at Annexure-A and the order dated 22.4.2004 at Annexure-B passed by the learned JMFC, Veraval and the learned Additional Sessions Judge, Junagadh, respectively and also praying for deletion of the charges framed against the petitioner under Section 379 of the I.P.C. The petitioner has also prayed for quashing and setting aside the complaint being Criminal Case No.1301/1991

pending before the learned JMFC Veraval.

3.It is the case of the petitioner that the Officer from the Gujarat Electricity Board (G.E.B.) – respondent No.2 herein had visited the factory premises of the petitioner and alleged the theft of the energy against the petitioner, and thereby had issued a bill of approximately more than Rs.1,60,000/-. The petitioner, therefore, raised objections against the said exorbitant bill issued by the concerned Officers of the GEB. Without taking the said objections into consideration, the GEB went ahead and registered a complaint against the petitioner being Criminal Case No.1301/1991 before the JMFC, Veraval for the offence punishable under Section 379 of the I.P.C., read with Section 39 of the Indian Electricity Act, 1910 alleging theft of energy.

4.It is also the case of the petitioner that the petitioner had challenged the aforesaid action of issuing such an illegal and exorbitant bill before the competent authority of GEB. The competent authority, after appreciating the facts of the case had quashed and set aside the bill of Rs.1,60,000/- and directed the board to issue a fresh bill to the tune of Rs.1 lac. The petitioner had even challenged the said order giving directions for issuance of a fresh bill of Rs.1 lac by way of filing a Civil Suit before the Court of Civil Judge, Veraval, which is pending for final hearing.

5.It is also the case of the petitioner that though the complaint was filed in the year 1991, till date, the trial has not yet commenced nor any evidence has been led in the matter, much less being pressed by the prosecution. Some where in the year 1994, the

learned JMFC, Veraval had framed charges in the aforesaid complaint to the effect as to whether the accused had committed the offence under Section 379 of the I.P.C., read with Section 39 of the Indian Electricity Act and whether the Court was competent to entertain the same.

6. Being aggrieved by the framing of such charges, the petitioner vide Exhibit 25 had given an application for modification of charges framed against the petitioner. The petitioner had contended that in view of the change in Section 39 of the Indian Electricity Act, which contains a specific provision for punishment for theft of electricity, charge under Section 379 of the I.P.C., would not be attracted. The learned JMFC, Veraval by an order dated 31.3.2003 had rejected the said application on the ground that it would not make any difference even though Section 39 of the Indian

Electricity Act has been substantially changed. The petitioner had challenged the said order of the learned JMFC before the Sessions Court in Criminal Revision Application No.31/2003. The learned Sessions Judge, Veraval by an order dated 22.4.2004 had rejected the said Criminal Revision Application confirming the order passed by the learned JMFC, Veraval. Being aggrieved and dissatisfied with the said two orders, the petitioner has filed the present petition under Section 482 of the Criminal Procedure Code for quashing and setting aside the said two orders as well as for quashing and setting aside the complaint itself.

7.This Court has issued the notice on 7.5.2004. While issuing the said notice, the Court has observed that in view of the facts that the complaint in question is filed in the year 1991 and till date the trial has not commenced nor

any evidence has been led in the matter, interim relief in terms of para-13(C) was granted. By further order dated 10.8.2004 this Court has granted leave to the petitioner to add Dy. Engineer (U & M) GEB, City Sub Division, Junagadh as party respondent No.2 and notice was also issued to the said newly added respondent No.2. Since then the interim relief is in operation.

8.Before Mr. Punit Bali, learned advocate appearing for Vyas Associates for the petitioner makes his submissions to the Court, Mr. M.A. Patel, learned APP appearing for the respondent No.1 – State has raised the preliminary objections that the present Criminal Misc. Application is not maintainable as it is second revision and as per the provision contained under Section 397 (3) of the Criminal Procedure Code, such second

revision is not maintainable. He has submitted that the petitioner has mainly challenged the order passed by the learned JMFC, Veraval on petitioner's application filed under Section 216 of the Criminal Procedure Code for modification of the charge framed by seeking deletion of the offence punishable under Section 379 of the Criminal Procedure Code, which application was rejected and against the said rejection order of the learned JMFC, Veraval the petitioner has moved a Revision Application before the learned Sessions Judge, Veraval, which was also rejected. He has, therefore, submitted that when both these orders are challenged in the present Misc. Criminal Application, the said application is not maintainable. This can be challenged only by way of filing Special Criminal Application under Article -227 of the Constitution of India. Mr. Patel, has further submitted that

the petitioner has also made the prayer in the present petition for quashing and setting aside the Criminal Case No.1301/1991 pending before the learned JMFC, Veraval. He has, however, submitted that the Criminal Case of 1991 cannot be challenged after more than 13 years by way of filing the present petition in 2004. He has, therefore, submitted that the present application deserves to be rejected without granting any relief to the petitioner.

9.Keeping in mind this preliminary objection raised by Mr.Patel against the maintainability of the present petition, Mr.Punit Bali, learned advocate appearing for the petitioner has submitted that second revision before this Court in exercise of its inherent power under Section 482 of the Criminal Procedure Code is maintainable. In support of his submissions, he relied on the decision of the Hon'ble

Supreme Court in the case of Krishnan vs. Krishnaveni and Anr., reported in 1997 (4) S.C.C. 241, wherein it is held that Ordinarily, when revision has been barred by Section 397(3) of the Code, a person – accused/ complainant- cannot be allowed to take recourse to the revision to the High Court under Section 397(1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397 (3) or Section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or

sentence imposed by the Magistrate requires correction, it is the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet with the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances to exercise the inherent power and in an appropriate case even revisional powers under Section 397(1) read with Section 401 of the Code. The Court has further observed that such power may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out.

10.Mr. Bali has further relied on the decision in the case of Shekhar and Anr., vs. State of Maharashtra and Anr., reported in (2001) 6 SCC 328, wherein it is held that even if it is an interlocutory order, the High Court's inherent jurisdiction under Section 482 is not affected by the provision of Section 397 (3) of Cr.P.C. That the High Court may refuse to exercise its jurisdiction under Section 482 on the basis of self imposed restriction is a different aspect. It cannot be denied that for securing the end of justice, the High Court can interfere with the order which causes miscarriage of justice or is palpably illegal or is unjustified.

11.Mr. Bali further relied on the decision of the Hon'ble Supreme Court in the case of Prasanta Kumar Dey vs. State of West Bengal, reported in (2002) 9 Supreme Court Cases 630, wherein second revision invoking inherent powers of

High Court under Section 482 after the dismissal of first one by Sessions Court was filed. The Sessions Court dismissed the applicant's revision petition filed against the dismissal by the Magistrate of application under Section 126(2) against ex parte maintenance order. In this context, the Hon'ble Supreme Court has held that the present one is a fit case where the High Court ought not to have dismissed the revision preferred before it solely on the ground of non-maintainability but should have gone into the merits so as to find out if it was a fit case calling for interference of the High Court, shorn of technicality under Section 401 read with Section 482 Cr.P.C.

12.Mr. Bali further relied on the decision of the Hon'ble Supreme Court in the case of State through Special Cell, New Delhi vs. Navjot

Sandhu alias Afshan Guru, reported in (2003)6 Supreme Court Cases 641, wherein it is observed that Section 482 Cr.P.C. Starts with words "Nothing in this Code". Thus, inherent jurisdiction of the High Court under Section 482 can be exercised even when there is a bar under Section 397 or some other provisions of the Cr.P.C. However, this power cannot be exercised if there is statutory bar in some other enactment. If the order assailed is purely of an interlocutor character which could be corrected by an exercise of revisional powers or appellate powers, the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of process of Court or where interference is absolutely necessary for securing the ends of justice. Inherent powers must be exercised very sparingly as cases which require interference would be few and far

between. The most common case where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party. This power should not be exercised against an express bar of law in some other enactment.

13. Based on the aforesaid decisions of the Hon'ble Supreme Court Mr. Bali has firmly urged before this Court that the present petition filed by the petitioner under Section 482 of the Cr.P.C. is maintainable and there is no bar of Section 397 of the Cr.P.C.

14. Mr. Bali has further submitted that the

petitioner has moved before the learned Magistrate for modification of the charge by seeking deletion of the offence punishable under Section 379 of the I.P.C., only because there was a change in the provision of Section 39 of the Indian Electricity Act. He has further submitted that the order of modifying the charge framed cannot be termed as interlocutory order as qua the modification of charge would substantially change the nature, weightage, and much less the evidence of the prosecution and it attains the finality of deletion of charge under Section 379 of IPC as also change the nature, prosecution and the weightage and consideration for passing the final order on the allegation and ultimately the matter will be decided on the basis of said change. He has further submitted that there is clear cut distinction between the old and new section 39 of the Indian Electricity Act. In

the old Section, there are clear wordings to the effect that; “whoever dishonestly abstracts, consumes or uses energy shall be deemed to have committed a theft within the meaning of IPC and existence of artificial means for such abstraction shall be prima facie evidence for such dishonest abstraction”. He has, therefore, submitted that within the old Section 39 of the Indian Electricity Act, the specific provision has been made for the applicability of the sections under the I.P.C. Pertaining to theft. He has further submitted that as far as new Section 39 is concerned, it reads as under :-

“whoever dishonestly abstracts consumes or uses any energy shall be punishable, with imprisonment with a term which may extend to three years or with a fine which shall not be less than Rs.1,000/- or with both. And if it is proved that any artificial means or means not

authorised by licensee exists for abstraction, consumption or use of energy by the consumer, it shall be presumed until the contrary is proved that any abstraction, consumption or use of energy has been dishonestly caused by the consumer."

15.Mr. Bali, submitted that from the plain reading of the aforesaid section, it is clear that a specific provision has been made for punishment in the section itself which impliedly bars the consequences under the I.P.C. He has, therefore, submitted that both the Courts below have committed an error in not considering the settled principle of law that the provisions under Special law would definitely prevail over the general law. In view of the specific provision under the amended Section 39 of the Indian Electricity Act, no conviction whatsoever could be ordered

under Section 379 of the I.P.C. Mr. Bali has further submitted that one cannot loose sight of the fact that the offence under Section 39 of the Electricity Act is an offence under the special legislation, namely, Indian Electricity Act as amended from time to time. The petitioner is, therefore, well within its rights to move an application under Section 216 of Cr.P.C. for alteration of the charge under Section 39 of Indian Electricity Act and for deletion of Section 379 of IPC in light of the fact that for the alleged illegal abstraction of electricity which the petitioner strongly disputes, an amount of Rs.1,00,169/- has already been deposited by the petitioner and there is no financial loss to the department. Mr. Bali further submitted that in various State Electricity Boards, if amount along with penalty as determined by the department is paid, the offence under Section 39 of the said

Act is compoundable. In light of this, he submitted that the order of framing charge or alteration of charge is not an interlocutory order and also that an application for alteration of charge cannot be misconceived as an interlocutory application.

16. In support of his submissions Mr. Bali has relied on the decision of Hon'ble Supreme Court in the case of **Avtar Singh vs. State of Punjab, reported in AIR 1965 Supreme Court 666**, wherein it is held that a theft of electricity is an offence against the Electricity Act and hence the prosecution in respect of that offence would be incompetent unless it is instituted at the instance of a person named in Section 50 of the Act. It is further held that dishonest abstraction of electricity mentioned in Section 39 of the Act cannot be an offence under the Penal Code for under it alone it is not an

offence, the dishonest abstraction is, by Section 39, made a theft within the meaning of the Code, that is, an offence of the variety described in the Code as theft. As the offence is created by raising a fiction, the section which raises the fiction, namely Section 39 of the Act, must be said to create the offence. Since the abstraction is by Section 39 to be deemed to be an offence under the Code, the fiction must – be followed to the end and the offence so created would entail the punishment mentioned in the Code for that offence. The punishment is not under the Code itself for under it abstraction of energy is not an offence at all. It is further held that Section 39 did not extend S. 378 of the Code in the sense of amending it or in any way altering the language used in it. Section 378 read by itself even after the amendment of S. 39, would not include a theft of electricity for

electricity is not considered to be movable property and only way in which it can be said that Section 39 extended Section 378 is by stating that it made something which was not a theft under Section 378, a theft within the meaning of that Section. It follows that if Section 39 did so, it created the offence itself and Section 378 did not do so.

17.Mr. Bali further relied on the decision of Punjab & Haryana High Court in the case of **Balbir Singh vs. State of Haryana, reported in 2000 (4) R.C.R. 180**, wherein theft case was registered against the accused and the accused paid the penalty as per the policy decision of the Electricity Department. While taking note of this policy decision, the High Court has quashed the FIR lodged against the accused. Keeping in view the aforesaid facts and circumstances of the case, the Court was of the

view that it was an abuse of process of Court to permit the respondents to continue with the criminal prosecution. The entire amount has been paid. The claim of the petitioner for refund is pending in the Civil Court. The Court, therefore, allowed the petition and quashed the FIR as well as consequential proceedings based thereon.

18.Mr. Bali has further relied on the decision in the case of Sanjay Verma vs. State of Haryana, reported in 2000 (4) R.C.R. 102 (P & H), wherein it was a case of pilferage of electricity – FIR lodged under Section 39 of Electricity Act. Penalty imposed by department was paid by the accused. However, the Government has not withdrawn criminal case though it had earlier taken policy decision to withdraw cases where compensation was paid by accused. The said FIR was quashed by the High

Court while exercising its inherent jurisdiction under Section 482 of the Criminal Procedure Code.

19.Mr. Bali has further relied on the decision of Delhi High Court in the case of Jasvinder Singh vs. State, reported in 2001 (2) RCR (Criminal) 251, wherein the Court has observed that bare reading of the afore-mentioned order would suggest that in case consumer who is found to have tampered with the seals of the meter or involved in direct theft of electricity, beside other action would be liable for criminal action. It is subject to one exception that in case the consumer is willing to pay the assessed bill at the rate and in the manner provided in the tariff and would come forward immediately for being assessed, no FIR would be lodged beside other actions. In that case the learned counsel appearing for the Delhi Vidyut

Board (DVB) has stated before the Court that as the amount of the impugned bill has been paid, DVB has no objection if the FIR is quashed. The learned counsel appearing for the State also has no objection if the FIR and the consequent proceedings arising out of that FIR are quashed. Accordingly, the FIR was quashed and petition was allowed. Similarly in the case of Neelam Jolly vs. The State (NCT of Delhi), reported in 2001(2) RCR (Criminal) 522, Delhi, a case was registered against the accused under Section 39 and 44 of the Indian Electricity Act, read with Section 379 of the IPC. The Department assessed the consumption and Bill was raised. The payment was not made immediately by the accused and FIR was lodged in the meantime. The Court observed that in view of the policy of the Delhi Vidyut Board and the fact that petitioner has already made the payment, the Court passed the order for

quashing the FIR lodged under Section 39/44 of Indian Electricity Act read with Section 379 of IPC and order for dropping of any proceedings emanating therefrom. Similarly, in the case of Jasvinder Singh vs. State, reported in 2001 (2) RCR (Criminal) 606 FIR was lodged for an offence under Section 44 of Electricity Act read with Section 379 of the IPC. The petitioner had deposited entire amount of impugned theft bill with Delhi Vidyut Board. The DVB had no objection regarding quashing of FIR and consequent proceedings. The Court has accordingly allowed the petition and quashed the FIR.

20.Considering the aforesaid decision Mr. Bali has submitted that earlier there was a policy of the Electricity Board and there was no specific provision of compounding of offence. Now Section 152 of the Electricity Act

specifically makes the said provision and in view of the said provision, the respondent Board as well as the State should come forward with the proposition that since the amount as determined by the competent authority has already been paid and there was no other offence committed by the petitioner, the complaint is required to be quashed.

21.Mr. Bali has further submitted that the Court is competent to alter or add to any charge at any time before the judgment is pronounced. In support of this submission he relied on the decision of Punjab and Haryana High Court in the case of Moola Singh vs. Puran Singh and Anr., reported in 1987 (1) RCR (Criminal) 184, wherein it is held that as per the provision contained under Section 216 of the Cr.P.C., any Court may alter or add to any charge at any time before the judgment is pronounced. He

has, therefore, submitted that the learned JMFC is well within his power to alter the charge framed by him earlier on an application moved by the petitioner for deletion of the charge under Section 379 of the IPC. His refusal to do so is nothing but the miscarriage of justice, which was not properly appreciated by the learned Sessions Judge and hence this Court, by invoking its inherent jurisdiction under Section 482 should allow this petition.

22.Mr. Bali has further relied on the decision of Hon'ble Supreme Court in the case of **Sohanlal and Anr., vs. State of Rajasthan, reported in AIR 1990 Supreme Court, 2158**, wherein it is held that under Section 216, addition to and alteration of a charge or charges implies one or more existing charge or charges. When the accused were discharged of all the charges and no charge existed against them, naturally an

application under Section 216 was not maintainable.

23.Mr. Bali has further relied on the decision of Hon'ble Supreme Court in the case of Ranbir Yadav vs. State of Bihar, reported in (1995) 4 Supreme Court Cases 392, wherein it is held that on a combined reading of Section 216 and 217 it is evident that after an alteration or addition of the charge the interest of the prosecution and the accused has to be safeguarded by permitting them to further examine or cross examine the witness already examined, as the case may be, and by affording them as opportunity to call other witnesses. It is undoubtedly true that discretion has been given to the Court to direct a new trial after addition or alteration of any charge, but it does not mean that every such addition or alteration in the charge which has been read

over and explained to the accused would lead to inevitable inference that the court has directed a new trial for them. It, therefore, follows that unless the Court passes a specific order and directs a new trial it cannot be presumed that a new trial has commenced only because an alteration or addition to a charge which has been read over and explained to the accused has been made. Any such direction given by the Court has to be judged on the touchstone of prejudice to the accused or the prosecution.

24. Based on the aforesaid legal submission and peculiar facts of the case Mr. Bali has strongly urged before the Court that the complaint is required to be quashed and set aside on all counts.

25. Mr. S.M. Sinha, learned advocate appearing for

the respondent No.2 Board has submitted that the present petition filed by the petitioner is not maintainable and the learned Sessions Judge has correctly discussed all the aspects of the matter and confirmed the order of the learned Magistrate rejecting the application filed by the petitioner under Section 216 for deletion of the charge under Section 379 of the IPC. He has further submitted that the learned Sessions Judge has rightly held that in case of conviction and sentence under Section 248(2) of the Cr.P.C., the petitioner would be convicted and sentenced for the offence punishable only under new Sec.39 of the I.E. Act, 1910 in consonance with the 1986 amendment, and would not, in view of the nature of the offence, be punished under Sec.379 of IPC. Thus, no prejudice would be caused to the petitioner by insertion of Sec.379 of the IPC in the charge directly or indirectly.

26.Mr. M.A. Patel, learned APP appearing for the State has submitted that in view of the preliminary objections raised by him earlier and in view of the fact of the present case, the petitioner is not entitled to any relief prayed for in the present petition. More than 14 years have passed after filing of the complaint and the petitioner was indulging in delaying practice by moving one or another application from time to time. The learned Magistrate be directed to forthwith undertake the trial and decide it as expeditiously as possible. Since the learned Sessions Judge has already directed to go on with the trial on day-today basis, no interference be called for while exercising its inherent jurisdiction under Section 482 of the Cr.P.C. He has further submitted that the petitioner is not entitled to claim the benefit of amended

provision as contained in Section 39 and 152 of the Indian Electricity Act. Repeal and Saving provisions contained in the Act debarred the petitioner from claiming the said benefit. He has, therefore, submitted that the present petition is required to be dismissed with costs.

27. After having heard the learned advocates appearing for the respective parties and after having gone through the complaint, petitioner's application under Section 216 of the Code for deletion of charge under Section 379 of I.P.C., the orders passed by the learned JMFC, Veraval and learned Sessions Judge, Junagadh in respect thereof and after examining the controversy raised before the Court in the light of statutory provisions and decided cases referred to and relied upon, the Court is of the view that both the Courts below are not justified in

rejecting the petitioner's application for deletion of charge under Section 379 of the Indian Penal Code. The submissions made by Mr. Bali, both in law as well as on facts, are found favour with the Court and the Court does not see any justification to send the petitioner to face trial for an offence under Section 379 of the Indian Penal Code. This issue, too, pales into insignificance in view of the fact that the Court found sufficient grounds and considerable force for quashing and setting aside the complaint itself subject to certain conditions, while exercising its inherent powers under Section 482 of Cr.P.C. The complaint is of 1991. More than 14 years have gone and the trial is not yet commenced. The petitioner has paid the amount of electricity charges as determined by the competent authority, though under protest and suit is still pending. State Electricity

Boards in certain States have framed the policy of not lodging criminal complaints and even if, they are lodged, to withdraw the same or to agree for quashing, if the amount of electricity consumption and penalty is paid by the consumer / accused. Now, in view of the amendment made in the Indian Electricity Act, an offence under Section 39 of the Act is compoundable. The Courts have quashed and set aside many complaints of similar nature, as indicated above, when the amounts have been paid by the consumer / accused.

28.Considering all these aspects and having regard to the entire facts and circumstances of the case, the Criminal Case No. 1301 of 1991 pending before the Court of Judicial Magistrate First Class, Veraval and all subsequent proceedings therein are hereby quashed and set aside, subject to the condition that the

petitioner shall pay an amount of Rs. 20,000/- to Respondent No. 2 Board and withdraw the Civil Suit filed by the petitioner challenging the order of the Competent Authority, within one month from the date of receipt of Writ from this Court or from the date of receipt of certified copy of this order, whichever is earlier. As a matter of fact, for both these conditions, Mr. Bali has agreed to during the course of his arguments.

29. Subject to the aforesaid directions and observations, this petition is allowed. Rule made absolute without any order as to costs. Direct service of this order is permitted.

[K.A. PUJ, J.]

Kks

